

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA)	CRIM. ACTION NO. 5:01CR30064
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
DAVOLD REAL ESTATE)	
PARTNERSHIP and)	
)	
DAVID STEPHEN KLEIN,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Pursuant to a plea agreement, the above-named parties each pled guilty to one count of an indictment charging them with crimes relating to illegal asbestos removal.¹ On June 16, 2003, this court sentenced Dr. Klein to twelve months imprisonment and levied fines against both Dr. Klein and the Partnership in the combined amount of \$225,000. At the time, the court reserved the issue of restitution, the legal basis of which was the subject of a hearing on February 11, 2004. After consideration of arguments presented by counsel, this court finds that there is no statutory basis for a restitution order in this case as a component of the defendant's sentence. However, the court concludes that it is authorized to impose payment

¹ Specifically, Dr. Klein pled guilty to Count Four of the Indictment, which charged him with knowingly owning and operating a renovation activity in violation of applicable work practice standards. *See* 42 U.S.C. § 7413(c)(1) (2000). The Davold Real Estate Partnership ("Partnership") also pled guilty to Count Six of the Indictment, which charged it with a violation of the same statute, albeit a separate regulatory violation. The government has conceded that the issue of restitution is limited to Dr. Klein's sentence.

of restitution as a condition of supervised release. Notwithstanding this authority, the court declines to impose such a condition in this case.

I. FACTS

The court will not recount the facts of this case in great detail. It is sufficient to note that the defendants before the court engaged in a scheme to remove asbestos illegally in contravention of federal regulations. As a result of this operation and related remedial action, Bernice and Donald Hammer claim to have suffered losses of income and of personal property. The Hammers' victim impact statement cites loss of business in the amount of \$9,000; loss in property value of antique post cards, antique comic books, and paper products in the collective amount of \$22,675; and loss of personal income in the amount of \$2,000, less \$160 in reimbursement from the government for expenses related to participation in the proceedings. The personal property of the Hammers was stored in the basement of the building that was the site of the illegal asbestos removal operation and of the ensuing remedial action.

II. PROCEDURAL POSTURE

The government has asked this court to order restitution in the amount of \$33,515 to compensate the Hammers for their losses. In response, the defendant has asked the court to find that an order directing him to pay restitution based on the Hammers' alleged losses would be improper in this case. In support of this position, the defendant offers three arguments. First, the defendant argues that restitution is not permitted under the plea agreement because "the Hammers are not victims of the specific conduct that is the basis of the count to which [the defendants] pled." (Motion to Determine Need for Restitution Hearing at 2.) Second, the

defendant argues that a final settlement agreement with the Hammers resolved all claims arising from the subject rental property and that any additional amount ordered during this criminal proceeding would result in a “windfall.” Third, the defendant questioned whether this court is authorized to issue such an order in this case. The third argument was raised primarily during oral argument and, at the request of the court, was more thoroughly briefed following the hearing. The court turns first to this third argument.

III. DISCUSSION

A. Statutory Authorization for Sentence of Restitution

Because the government has not identified statutory authorization for restitution in this case, the court concludes that restitution is unavailable. Federal courts do not have inherent power to authorize a restitution order. *United States v. Broughton-Jones*, 71 F.3d 1143, 1149 (4th Cir. 1990). Instead, the authority for such an order must be provided by statute. In this case, the parties do not dispute that the two possible sources for this statutory authority are title 42 and title 18. Neither title provides a statutory basis for a restitution order in this case.

1. Title 42

In title 42, the statutory basis for the defendants’ offense, Congress authorized the imposition of confinement and fines as penalties for noncompliance with the regulations governing asbestos removal. 42 U.S.C. § 7413(c). The parties do not dispute that a restitution remedy was not included in the list of criminal penalties in this title.

2. Title 18

Although Congress has authorized the imposition of restitution in title 18, those provisions do not encompass the crimes to which the defendants pled. The only provision of title 18 that might provide authority to issue an order of restitution in this case is § 3663.² Section 3663 provides authority to issue a restitution order in three general categories of cases: 1) for violations of title 18; 2) for violations of particular sections of title 21 and title 49; and 3) in any criminal case to the extent to which the parties have assented in a plea agreement. The second and third categories are inapplicable to the case before the court.³ The question that remains is whether the defendant was “convicted of an offense under [title 18]” because the grand jury charged a violation of § 2 of title 18 in addition to the substantive violation of title 42.⁴

² Section 3556 provides that “[t]he court . . . shall order restitution in accordance with section 3663A and may order restitution in accordance with section 3663.” Section 3663A is inapplicable to this case as that provision mandates an order of restitution in cases involving a crime of violence, an offense against property under title 18 or under title 21, or a violation of § 1365.

³ It is not disputed that the offense to which the defendant pled guilty is not a violation of the particular sections of title 21 and title 49 that are listed in § 3663. Moreover, the plea agreement in this case does not include any provisions concerning restitution. See *Broughton-Jones*, 71 F.3d at 1148 (reasoning that absence of specified amount of restitution in the plea agreement frustrated the application of § 3663(a)(3)).

⁴ Section 2 is entitled “Principals” and provides as follows: “(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another

The court concludes that the defendant was not convicted of a title 18 offense. Section 2 does not establish a separate offense but “merely determines which offenders should be punished as principals.” *United States v. Snider*, 957 F.2d 703, 706 (9th Cir. 1992). While few courts have considered the precise question presented by this case, several courts have found that § 2 does not establish a separate, substantive offense. *United States v. Scroger*, 98 F.3d 1256, 1262 (10th Cir. 1996); *United States v. Simpson*, 979 F.2d 1282, 1286 (8th Cir. 1992); *United States v. Kegler*, 724 F.2d 190, 200-01 (D.C. Cir. 1983); *United States v. Cowart*, 595 F.2d 1023, 1031 n.10 (5th Cir. 1979); *United States v. Campbell*, 426 F.2d 547, 553 (2d Cir. 1970); *United States v. Gerhart*, 275 F. Supp. 443, 455 (S.D. W. Va. 1967). These cases confirm the court’s reading of the statute’s text and its understanding of the provision’s purpose. Section 2, which is included in the general-definition chapter of title 18, provides that an aider or abettor is “punishable as a principal.” This language does not provide a penalty, *except in reference to the underlying substantive offense*. The omission of an independent penalty comports with the purpose of § 2—to remove the distinction between aider and abettor and principal, rather than to codify a substantive offense. S. Rep. No. 82-1020 (1951), *reprinted in* 1951 U.S.C.C.A.N. 2578, 2583.

would be an offense against the United States is punishable as a principal.”

The Ninth Circuit Court of Appeals has also adopted this interpretation of the statute.⁵ In *United States v. Elias*, a jury convicted the defendant of disposing of hazardous waste without a permit, a violation of title 42. 269 F.3d 1003, 1007-08 (9th Cir. 2001). Based upon this conviction, the district court ordered the defendant to pay over \$6 million in restitution to an employee who was severely injured following exposure to by-products from a cyanide leaching process. *Id.* The defendant appealed this component of the sentence to the court of appeals, which vacated the restitution order. *Id.* In so doing, the court rejected the argument of the government that § 2 provided the statutory authority for an order of restitution. *Id.* at 1021. The court reasoned that “ ‘the mention of [that provision] [did] not bring the restitution order within the ambit of [§ 3663]’ because ‘§ 2 does not establish ‘an offense’ of which a defendant may be convicted; it merely determines which offenders may be punished as principals.’ ” *Id.* at 1021 (citing *Snider*, 957 F.2d at 706).

The government has identified a few cases in which a court of appeals has reached a different conclusion, but a few of these decisions merely stand for the proposition that conspiracy is an independent, substantive offense under title 18. *See, e.g., United States v. Minneman*, 143 F.3d 274, 284 (7th Cir. 1998); *United States v. Daniel*, 2001 WL 856985 (6th Cir. 2001) (unpublished disposition). The decision most supportive of the government’s position is *United States v. West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997). In that case, the Third Circuit Court of Appeals, without any analysis, found that an order of restitution

⁵ The parties have failed to produce—and the court’s own research has failed to uncover—any guidance from the Fourth Circuit Court of Appeals concerning this particular issue.

was proper because the indictment “also charged a violation of 18 U.S.C. § 2,” in addition to the substantive offense for which restitution was improper. However, the court’s laconic rationale for its holding was predicated upon an assumption that restitution was authorized for a “violation” of § 2. This court cannot be persuaded by an argument that does no more than to restate the conclusion urged by the government. The court therefore concludes that there is no statute authorizing the court to issue an order of restitution as an independent component of the defendant’s sentence.⁶

B. Restitution as a Condition of Supervised Release

Because the offense does not fall into one of the categories established in § 3663, the court has no authority to issue an order of restitution as a component of the sentence. However, because the categorical limitations of §§ 3663 and 3663A are expanded by other sections of title 18, the court does have authority to order restitution as a condition of supervised release.

To reach the conclusion that the court may give with one hand what it taketh with another, one must travel a rather circuitous path through title 18. Section 3551 provides that “a defendant who has been found guilty of an offense described in *any Federal statute* . . . shall be sentenced in accordance with the provisions of [chapter 227 of title 18].” § 3551 (emphasis

⁶ The court observes that the government could have altered this outcome by negotiating a plea to the conspiracy count or by including a provision for restitution in the plea agreement (subject to limitations not discussed here).

added). Within this chapter, § 3583 authorizes the court to impose a term of supervised release when it sentences the defendant for a felony or a misdemeanor or when authorized by statute. Section 3583 then lists several conditions of supervised release, several of which are mandatory. In addition to these mandatory conditions, the court is authorized, subject to certain considerations, to impose “any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.” § 3583(d). One of these discretionary conditions of probation, § 3563(b)(2), provides that the court may order the defendant to “make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)).” The “limitation” to which the provision refers concerns the specific types of offenses for which restitution is appropriate. Section 3563(b)(2) therefore expands the reach of §§ 3663 and 3663A to offenses other than those enumerated in each provision. *United States v. Bok*, 156 F.3d 157, 166 (2d Cir. 1998); *see also United States v. Butler*, 297 F.3d 505, 518 n.13 (6th Cir. 2002); U.S. Sentencing Guidelines Manual § 5E1.1(a) (2003).

C. Amount of Restitution

Having established that restitution can be ordered as a condition of supervised release, the court now turns to an initial calculation of the amount of restitution.⁷ The court will

⁷ As reviewed in the presentence investigation report, Dr. Klein has extensive financial resources from which to reimburse the Hammers for the full amount of the alleged loss should the court order that amount. *See* § 3663(a)(1)(B)(i)(II).

assume without deciding that the Hammers are victims of the offense. Section 3663(b) provides the basis for calculating the amount of loss. Based on established precedent in the Fourth Circuit, the court rejects the Hammers' claim to lost business income. § 3663(b); *United States v. Mullins*, 971 F.2d 1138 (4th Cir. 1992); *United States v. Sharp*, 927 F.2d 170, 174 (4th Cir. 1991). "[Congress] has not included lost income in the type of restitution that may be ordered in property cases and, unless and until its amends the statute to include lost income, courts may not order such restitution in property cases." *Sharp*, 927 F.2d at 174. The court also rejects the claim submitted for loss of wages absent personal injury and unrelated to the prosecution of this case.

The Hammers' claim to loss of property due to the destruction of antique post cards, antique comic books, and paper products is a bit more difficult. The government, based on the Hammers' victim impact statement, estimates these amounts at \$22,120, \$280, and \$275, respectively. Except for the paper products, these amounts are predicated upon an imprecise, subjective estimate. Because these items were kept in the unfinished basement of a business establishment, the court is not convinced that the government has carried its burden with respect to the full amount as estimated by the Hammers. *Mullins*, 971 F.2d at 1147. According to an exhibit submitted by the defendant during the hearing, the basement is "unfinished" and "filthy" and not appropriate for dry storage. (Klein Ex. 1.) Indeed, according to the defendant, "[t]he area is little more than access to the heating and plumbing pipes, and at one time functioned as a coal cellar." (*Id.*) It is unlikely (albeit not inconceivable) that a reasonable person would leave precious personal property in such a basement when the value

of those possessions is compromised by exposure to poor ambient conditions. It seems likely to the court that if the value of these possessions truly exceeded anything beyond \$5,000 (to be generous), the property would not have been stored in the basement. Accordingly, the court will estimate the property destroyed at \$5,000.

D. Effect of Settlement Agreement

The defendant contends that the settlement agreement executed by the Hammers and Dr. Klein (and the Partnership) on or about December 13, 2000 prevents this court from ordering further restitution to compensate the Hammers for their losses. The court rejects the defendant's contention. Nevertheless, the court does consider the existence of this agreement relevant to the decision to impose a particular amount of restitution as a condition of supervised release due to 1) the equitable nature of restitution and 2) the considerations involved when imposing a condition of supervised release.

1. Restitution as Equitable in Nature

At an absolute level, the settlement agreement does not prevent the court from ordering restitution as a condition of supervised release. *See United States v. Karam*, 201 F.3d 320, 328 (4th Cir. 2000). While an order of restitution in a criminal case is a criminal penalty, its operation is still bound by equitable principles. *See id.* at 329 n.11. Compensation that has been provided to a victim in order to make him whole (excluding insurance payments) must be considered when calculating the amount of loss to be remunerated. *See* § 3664(j)(2) (directing that amount paid to a victim under an order of restitution shall be reduced by compensatory damages awarded in a civil proceeding); *see also* U.S. Sentencing Guidelines

Manual § 5E1.1(b)(1) (2003) (noting that an order of restitution is improper when full restitution has been made). In proper circumstances, a settlement agreement can represent a liquidation of inherently subjective valuations and can provide some basis for concluding that the victim has received adequate compensation.

2. Requirements of § 3583(d)

When imposing restitution *as a condition of supervised release*, the court must also consider the factors listed in § 3583(d).⁸ The condition must bear a reasonable relation to “the nature and circumstances of the offense and the history and characteristics of the defendant,” § 3553(a)(1), and to the need for the sentence imposed “to afford adequate deterrence to criminal conduct,” § 3553(a)(2)(B).⁹ In the court’s view, to bear reasonable relation to the

⁸ Two categories of factors in § 3583(d) are inapplicable to this case. The condition of restitution imposed must involve no greater deprivation of liberty than is reasonably necessary to afford adequate deterrence, to protect the public from further crimes, and to provide the defendant with needed rehabilitative services. Here, imposition of a condition of restitution would not deprive the defendant of his liberty, only his property. In addition, the condition imposed must be consistent with any pertinent policy statements issued by the Sentencing Commission. No such pertinent policy statement has been brought to the court’s attention.

⁹ The court must also consider the need for the sentence imposed “to protect the public from further crimes of the defendant,” § 3553(a)(2)(C), and the need for the sentence imposed “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,” § 3553(a)(2)(D). It is unlikely that a condition of restitution would bear reasonable relation to the need to protect the public from further crimes or to provide rehabilitative services to the defendant in this case.

nature and circumstances of the offense and history and characteristics of the defendant, the amount of restitution imposed as a condition of supervised release must reflect the existence and terms of the civil settlement agreement. Although the court recognizes that in some circumstances it may be proper to place less emphasis on the settlement agreement in order to afford adequate deterrence, such circumstances are not present here.

In consideration of the equitable nature of restitution and of the factors to be evaluated when imposing restitution as a condition of supervised release, the court finds that the settlement agreement between the parties represents the amount needed to compensate the Hammers. On its face, the release is expansive, and there is no evidence here of fraudulent procurement of the agreement. Even if a settlement agreement cannot be said to prevent the court from ordering restitution in proper circumstances, it is not clear that such circumstances are present here. Therefore, the court will not order restitution as a condition of supervised release and finds it unnecessary to conduct further hearing on the matter.

An appropriate order shall this day enter. The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA)	CRIM. ACTION NO. 5:01CR30064
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v.)	<u>ORDER</u>
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DAVOLD REAL ESTATE)	
PARTNERSHIP and)	
)	
DAVID STEPHEN KLEIN,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

that the defendant's February 6, 2004 Motion to Determine Need for Restitution Hearing shall be, and it hereby is, GRANTED IN PART, as more fully explained in the court's Memorandum Opinion.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date